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VIA EMAIL

Christopher Calfee Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

**RE: Comments on Preliminary Discussion Draft Proposed Updates to the CEQA
Guidelines - 2015 - Comments Due October 12, 2015**

Dear Mr. Calfee:

The Coalition of California Neighborhoods ("Coalition"), by and through its counsel, recommends against adoption of the Proposed Updates to the CEQA Guidelines ("CEQA Guidelines Updates"), as contained in OPR's current Preliminary Discussion Draft. Our concerns focus on OPR's proposed revisions to the CEQA Guidelines that would permit CEQA reviewing agencies to replace the Level of Service ("LOS") traffic analysis with a Vehicle Miles Traveled ("VMT") threshold of significance. These changes, which are contained in *both* the CEQA Guidelines Updates and the Preliminary Discussion Draft of OPR's Updates to the CEQA Guidelines Implementing SB 743 ("SB 743 Implementation Guidelines"), should be rejected because they would:

- (1) Undermine the primary purpose of CEQA: identification and mitigation of potential significant environmental impacts;
- (2) Make meaningful public review and comment on projects difficult;
- (3) Allow adoption of flawed and inappropriate thresholds of significance (including VMT) by CEQA reviewing agencies;
- (4) Permit CEQA reviewing agencies to unlawfully rely exclusively on VMT for purposes of identifying potentially significant traffic impacts;
- (5) Prohibit the use of LOS or traffic delay to determine that a project may have a significant impact on the environment.

The Coalition acknowledges OPR's statement that the SB 743 Implementation Guidelines are being evaluated separately. However, the CEQA Guidelines Updates that are the subject of *the current process* propose replacement of LOS with VMT ("OPR proposes to revise the question that

currently refers to ‘level of service’ to focus instead on a project’s vehicle miles traveled,” CEQA Guidelines Updates, p. 44.) OPR’s attempt to bifurcate at least some discussion of the traffic impacts of its proposed CEQA Guidelines changes has made it impossible to determine, with confidence, whether or when these issues will be fully addressed, and in what forum.¹ For that reason, the Coalition herein provides comments to both the CEQA Guidelines Updates and the SB 743 Implementation Guidelines.

1. Allowing Indeterminate Thresholds of Significance Would Undermine The Purpose Of CEQA

The cornerstone of CEQA is the *identification* and *mitigation* (or elimination) of a project’s potential significant environmental impacts. The CEQA Guidelines Updates would allow, for the first time, the exclusive use of thresholds of significance to determine whether a project will have a significant impact on the environment. The mitigation component of CEQA would be rendered meaningless if, at the outset, a process is adopted that makes it difficult or impossible to identify all of the potential significant environmental impacts. That is precisely the effect that the unrestricted use of thresholds of significance would have on CEQA.

Generally speaking, thresholds of significance are technical standards created by regulatory agencies for the narrow purpose of evaluating compliance with a specific regulatory scheme -- *not CEQA compliance*. For example, water quality standards promulgated by a Regional Water Quality Management Control District may be created for the purpose of determining compliance with the Clean Water Act. Although those water quality standards (*i.e.*, water quality thresholds of significance) were not created for CEQA-compliance purposes, a CEQA reviewing agency may use those standards as *a part* of the CEQA review process. Importantly, however, because thresholds of significance are created for a purpose narrower than CEQA (*e.g.*, evaluating compliance with the Clean Water Act), they cannot be used as a substitute for other, broader methods of identifying potential significant environmental impacts.

Here, the CEQA Guidelines Updates would allow thresholds of significance to be used by CEQA reviewing agencies as the *sole* basis for determining whether a project could have a potentially significant impact on the environment as defined by CEQA. Thresholds of significance -- which were not designed to be used exclusively for evaluating CEQA compliance -- would replace long-standing CEQA procedures. Exclusive reliance upon thresholds of significance would result in the failure to identify significant environmental impacts outside of the narrow issues that they were

¹ These two sets of proposed CEQA Guideline revisions are inextricably intertwined and require concurrent review and comment. The hearing, comment, and revision processes for the CEQA Guidelines Updates and the SB 743 Implementation Guidelines should be merged. By separating these discussions, it is difficult for the public to provide thorough, comprehensive comments on this important issue.

designed to evaluate. As a result, a project that otherwise might have required preparation of an EIR may only need to prepare a reduced EIR analysis, or it may avoid EIR analysis entirely.

The CEQA Guidelines Updates do not specify the thresholds of significance that can be used to study any particular potential significant environmental impact. Even worse, there is significant risk that the limited-purpose Vehicle Miles Traveled ("VMT") threshold of significance will be used to the exclusion of other, potentially more appropriate methods of CEQA traffic analysis. For example, while urban particulate emissions from truck traffic may be calculated using an average truck trip threshold of significance in an urban environment, that same threshold of significance would fail to account for truck trips in an environment with a higher concentration of dirt roads, or in an area already significantly impacted by particulate emissions (*e.g.*, the Coachella Valley).

Additionally, the exclusive use of thresholds of significance may create an appearance of certainty that is inappropriate under the circumstances. Many thresholds of significance have accepted methods of calculation and reporting that provide meaningful measurements that can be accurately and appropriately applied to narrow and specific issues. But a municipality's exclusive reliance on VMT, for example, may create the appearance of statistical and scientific reasonableness when, in fact, a VMT analysis may not identify the devastating traffic impacts on the neighborhoods surrounding or impacted directly by a project. At bottom, thresholds of significance are not, in most cases, appropriate for determining whether a project will have a potential environmental impact outside of the narrow issues for which the specific thresholds of significance were developed.

The Coalition acknowledges that it is sound public policy to support the use of thresholds of significance, including VMT, that have been developed by public agencies with highly developed, if narrow, expertise as part of a CEQA analysis. Used appropriately and in conjunction with other methodologies, they can help promote thoughtful and appropriate standards. However, thresholds of significance cannot substitute for broad-based analyses intended to capture the totality of significant environmental impacts that may result from a given project. Otherwise, the veneer of expertise that often accompanies a threshold of significance, combined with CEQA's low "substantial evidence" standard, will lead to faulty CEQA decisions.

2. Allowing The Widespread Use Of Thresholds Of Significance Would Make Public Review And Comment More Difficult

The public's right to review and comment upon a proposed project is a fundamental component of CEQA. The widespread use of thresholds of significance, however, would make meaningful public review difficult and more costly. The unrestricted adoption of thresholds of significance also would allow public agencies to make improper CEQA determinations based on complex (but

inappropriate) thresholds of significance that would be difficult for the public to evaluate and to challenge. The CEQA Guidelines Updates and SB 743 Implementation Guidelines should be revised to remove these barriers to public participation.

A. The Public May Not Be Able To Evaluate The Appropriate Uses Of Thresholds Of Significance

Adoption of thresholds of significance would require members of the public not only to review CEQA analyses conducted by the CEQA reviewing agencies, but also to conduct entirely new and different analyses of one or more thresholds of significance. Specifically, to understand a public agency's determination, a member of the public would need to review the background and basis for the adoption of the threshold of significance, likely from an unrelated public agency. Proper analysis of the threshold of significance would require:

- Determination that the other public agency used legal means and scientifically supported assumptions to adopt the threshold of significance;
- Identification and evaluation of the purpose and use of the threshold of significance at the time it was created;
- Determination that the threshold of significance has been applied in the correct manner to the CEQA project at issue;
- Determination that use of the threshold of significance, independently or in concert with other processes employed by the reviewing agency, correctly identifies a project's potential significant environmental impacts.

Because thresholds of significance typically are created by separate public agencies, at different times, and for non-CEQA purposes, the information needed to conduct the analyses described above may not easily be accessible by the public. This would make meaningful public review of CEQA decisions that are based on thresholds of significance difficult, if not impossible.

B. The Public May Not Be Able To Identify The Appropriate Limitations Period For Challenging Inappropriate Applications Of Thresholds Of Significance

Adoption of thresholds of significance would make it difficult to determine the statute of limitations period applicable to project-specific agency decisions. Public agencies and real parties would likely claim that challenges to the methodology and application of a threshold of significance are time barred. In addition, public agencies would likely claim that during the CEQA review process, they are not required to respond to comments regarding an adopted threshold of significance because any specific methodology was part of a separate and independent public hearing process at the time that it was created.

Specifically, both public agencies and real parties may claim that any challenge should have been made at the time of adoption of the threshold of significance, despite the fact that the threshold of significance may have been adopted months or years earlier, in an entirely separate context, and before the project at issue was conceived. If the time to challenge the adoption of the threshold of significance has expired, a CEQA reviewing agency may argue that no further challenge should be allowed. The mere threat of this defense by the CEQA reviewing agency may dissuade members of the public away from raising otherwise viable challenges to the project.

The CEQA Guidelines Updates should be revised to make clear that any public agency that relies upon a threshold of significance must demonstrate, using a substantial evidence standard, that the threshold of significance was valid, was validly adopted, was applied as intended, and was used *only* to evaluate potential significant environmental impacts properly within the scope of issues that the threshold of significance was designed to evaluate.

3. The SB 743 Implementation Guidelines Are Highly Flawed

As explained above, it remains unclear how much of OPR's current review process will overlap with the specific issues contained in the SB 743 Implementation Guidelines, or whether the separate review processes will be merged as recommended. In the event that the two processes are merged, or that any of the traffic issues contained in the SB 743 Implementation Guidelines are evaluated during this review process, the Coalition provides these comments:

In pertinent part, SB 743 provides:

(2) Transportation analyses under the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) typically study changes in automobile delay. New methodologies under the California Environmental Quality Act are needed for evaluating transportation impacts that are better able to promote the state's goals of reducing greenhouse gas emissions and traffic-related air pollution, promoting the development of a multimodal transportation system, and providing clean, efficient access to destinations.

(b) It is the intent of the Legislature to do both of the following:

(1) Ensure that the environmental impacts of traffic, such as noise, air pollution, and safety concerns, continue to be properly addressed and mitigated through the California Environmental Quality Act.

(2) More appropriately balance the needs of congestion management with statewide goals related to infill development, promotion of public health through active transportation, and reduction of greenhouse gas emissions.

In the SB 743 Implementation Guidelines, OPR acknowledges that the implementing legislation (SB 743) *did not authorize establishment of any threshold of significance*. (SB 743 Implementation Guidelines, p. 8.). Nor does SB 743 require abandonment of LOS; LOS simply cannot be the *only* method used for conducting traffic impact analyses under CEQA. Nevertheless, adoption of the SB 743 Implementation Guidelines will likely result in use of the VMT threshold of significance as the sole method of identifying potentially significant traffic impacts. Further, as explained below, the exclusive use of VMT will not only result in flawed CEQA analyses, but will also cause substantial harm to neighborhoods which surround or are impacted directly by projects that generate significant local traffic impacts.

A. VMT Ignores Emissions Generated By Idling Vehicles

SB 743 and OPR's SB 743 Implementation Guidelines both acknowledge that the primary public policy concerns for traffic-related revisions to the CEQA Guidelines are to "reduce greenhouse gas emissions and traffic-related air pollution" The SB 743 Implementation Guidelines fail to advance these public policy objectives. In fact, these revisions contribute to *increased* greenhouse gas emissions and traffic-related air pollution. In particular, the VMT threshold of significance does not, because it cannot, distinguish between the differing volumes of pollutants generated by vehicles traveling at different speeds – including those stuck in traffic.

Effectively "banning" LOS analysis will result in significantly increased air emissions from vehicles stuck in traffic. The United States Environmental Protection Agency ("EPA"), the South Coast Air Quality Management District ("SCAQMD") and the County of Sacramento have all studied the significant air emissions caused by idling cars.² A car that takes an hour to travel a mile because of significant traffic delays, and the resulting idling, generates significantly more emissions than a car traveling that same mile in one minute. VMT analysis treats all miles as equal, despite significant variance in the volume of air emissions. In this regard, adoption of VMT would thwart progress towards achievement of SB 743's goals of reduced greenhouse gas emissions and traffic-related air pollution.

B. Regional Impacts Are Favored At The Expense Of Local Community Impacts

The SB 743 Implementation Guidelines ignore impacts caused to local communities by traffic congestion, safety, and air quality emissions. The SB 743 Implementation Guidelines do not consider the impact of traffic congestion in residential neighborhoods, including:

² See, e.g., "Extended Vehicle Idling," U.S. Environmental Protection Agency, available at <http://www3.epa.gov/otaq/stateresources/policy/transp/tcms/extended_idling.pdf>.

- Increased localized air emissions caused by gridlocked traffic;
- Public safety impacts on pedestrians and cyclists on gridlocked residential neighborhood streets; and
- Noise impacts from gridlocked streets in residential neighborhoods.

As defined by the SB 743 Implementation Guidelines, a project "may" have a significant environmental impact if it will result in more VMT than the "regional average." But this does not accurately account for the full environmental impact of a project, particularly local impacts. In this regard, use of a "vehicle hours traveled" methodology would be superior to VMT.

Highly impacted parking is viewed as a *positive* outcome by the SB 743 Implementation Guidelines. Under these revised guidelines, a project that provides adequate parking can be found to create significant traffic impacts, while "limiting parking supply" is an approved traffic reduction mitigation measure. (SB 743 Implementation Guidelines, p. 18.) This "update" to the CEQA Guidelines would reduce the quality of life in project-impacted neighborhoods by *incentivizing* parking shortages.

All of the mitigation measures proposed in the SB 743 Implementation Guidelines are regional, ignoring localized impacts. For instance, mitigation measures relating to improved transit, increased bicycle lanes, and an improved jobs-to-housing balance are all admirable goals. As currently drafted, however, there is no requirement that these mitigation measures be implemented in the areas impacted by the proposed projects. Even before adoption of the SB 743 Implementation Guidelines, many jurisdictions allowed traffic mitigation measures that were located miles away from the project area and that did nothing to mitigate the impact of the project on the local community. Improvement of bicycle lanes 15 miles from a project, for example, might be desirable for the public agency, but does nothing to meet the CEQA requirement of reducing project impacts to a level of insignificance. CEQA is intended to protect citizens from localized and regional impacts in equal measure.

Rather than striking an appropriate balance, however, the proposed SB 743 Implementation Guidelines make it possible to miss devastating neighborhood-level impacts and, even if all local impacts are identified, to "mitigate" them by making improvements in other areas.

C. Removal of Traffic Lanes Would Worsen Environmental Impacts

The SB 743 Implementation Guidelines include proposals to eliminate traffic lanes for public safety and for mass transit. This would exacerbate already unacceptable traffic conditions in many neighborhoods, and would increase, rather than reduce, potentially significant project impacts. According to the Federal Highway Authority, elimination of traffic lanes increases vehicle accidents and leads to greater traffic congestion. (United States Department of Transportation, Federal

Highway Authority Freeway and Operations Handbook.) Not surprisingly, removal of traffic lanes leads to further congestion even when those traffic lanes are replaced with transit-oriented uses, such as HOV lanes, bicycle lanes, or bus lanes. (“Empirical Assessment of Traffic Operations” (Chen, et al, 2005).)

D. Healthy Communities

CEQA requires maintenance of healthy communities. As stated by the California Attorney General:

Every Californian should have the opportunity to live in a community that is healthy and safe. This means that individuals must be able to make informed decisions about the environment in which they live, work, and play, and local governments must make informed choices in the planning and development of communities. . . . By making environmental justice a priority within the Office’s environmental work, including its work under the California Environmental Quality Act, the Attorney General is committed to bringing the environmental benefits of informed decision making to everyone.

By focusing solely on the regional level and ignoring community level impacts, the SB 743 Implementation Guidelines would actively work against, rather than promote and sustain, healthy communities. A balance between regional and local impacts is required to meet the legal and public policy requirements of CEQA.

4. Conclusion

The abandonment of LOS and possible adoption of VMT as the sole method of identifying a project’s potentially significant traffic impacts will have devastating impacts on neighborhoods. CEQA reviewing agencies will be permitted to elevate the advancement of regional traffic policies over the safety, convenience, and overall quality of life of residents living near proposed projects. The CEQA Guidelines should not be amended to allow this distortion of CEQA’s purposes.

Accordingly, we request that thresholds of significance be permitted as part of a CEQA analysis *only* when accompanied by sufficient analysis of each proposed methodology. At a minimum, proper analysis of the threshold of significance would require:

- (1) Determining that a legally appropriate process was followed during the adoption of the threshold of significance;
- (2) Determining that scientifically supported assumptions were used to create the threshold of significance;



- (3) Determining the original purpose and use of the threshold of significance at the time it was created;
- (4) Determining whether the threshold of significance is currently being used in the CEQA process for its intended purpose; and
- (5) Determining whether application of the threshold of significance to a specific project will correctly identify a project's potential significant impacts on the local environment.

Further, the SB 743 Implementation Guidelines are fundamentally flawed and should not be adopted without significant revisions to address the issues raised in this letter. Specifically, reliance on VMT as a potentially exclusive method for identifying potentially significant traffic impacts must be abandoned. Any methodology that is adopted for measuring traffic impacts must fully and fairly take into account project impacts on surrounding neighborhoods, and require mitigation to address those specific impacts.

Sincerely,

BROWN RUDNICK LLP

A handwritten signature in black ink that reads 'Geoffrey K. Willis'. The signature is written in a cursive, flowing style.

GEOFFREY K. WILLIS